

Claimant replaces roof shingles on houses. He testified that he earned \$100 a day and was paid in cash by Mr. Jorge Cortez. Claimant thought he injured his big toe in October 2009 but when medical records indicated he had been treated on August 28, 2009, in Dallas, Texas, he changed his mind and said it happened in July. Claimant described his injury:

I was putting up a board and the house was really steep, and I couldn't hang onto it, and so it pulled off and it made like a ball, made like a lump on me.¹

Claimant said the 12-foot board was a 2-by-12 and it landed on top of his left foot/big toe. Even though claimant's toe was hurting, he continued to work. He testified that he told Mr. Jorge Cortez and Mr. Tim Voegeli about his injury the next day. On the day of claimant's injury, he testified that there was six individuals working five days a week for the same amount of pay. Claimant testified that there were two co-workers that witnessed the accident but they have all returned to Mexico.

Claimant was asked whether he had worked for any other employers in 2009 for which he denied. Claimant said he has always worked for Mr. Cortez. Claimant testified:

Q. And how steep was the roof pitch?

A. It was a two-story.

Q. But how steep was the roof in terms of the pitch?

A. Eleven.

Q. Twelve is about -- is the steepest?

A. Yes, 12 is a wall kind of.

Q. And you were working on an 11-pitch roof?

A. Yes.²

Timothy Voegeli, respondent's owner and sole proprietor, testified that he hired Jorge Cortez and then Mr. Cortez hires his own crew members.

Q. And when did this conversation take place and when did you look at his toe?

A. This happened toward the end of August, and I can get the exact date, because I have a record of the house that we were working on, it was the widowed elderly lady, it's right down the street from Habitat's Restore, if you go south and you take a left, it was like two blocks in from there. I know the area, but I can't remember the street name or the address, but I can get that.

¹ P.H. Trans .at 15.

² *Ibid.* at 31.

Q. When Chaparro, Mr. Arrellano, showed you his toe, did he relate to you any type of injury or incident that caused the blister to his toe?

A. Yes, he told me that -- well, he told me through George that in April, before we had started working again, you know, full time, that he was working for another company, and it was a very steep roof, and he was working for them because they were too afraid to climb this steep roof, so he was in essence proud that he could climb this steep roof and work. And that's when he got the blister, and from April on it festered, and I said, well, this should have been taken care of a long time ago. I said, we've got to get him to the doctor. So they tried to take him to the clinic here in town, George did, and I don't know if they wouldn't see him or they asked too many questions, I don't know what happened, because I didn't -- George took him to the doctor, and it was that next weekend, this happened during the week, it was that weekend George took him to the clinic in Dallas, and when he came back, he had medicine for his toe, he had medicine for his diabetes and whatnot, and George let him -- George brought him to the jobs and just let him, you know, pick up trash, things that he could do without getting on the roof, because I told him, I said, there is no way that you can put him on the roof.³

Mr. Voegeli testified that he told claimant he could not continue working on roofs then the very next day claimant went to work for Arambula or Doberman. Claimant returned to work for respondent in mid-September. Mr. Voegeli testified that the first time he became aware that claimant was filing a workers' compensation claim was when he received paperwork in the mail from Mr. Slape's office.

Q. And at any time during -- from July through the time you received the letter from Mr. Slape's office, did Chaparro as you know him ever report an injury or an incident involving any type of on-the-job activity or injury?

A. Never.

Q. You heard him testify about the steepness of that roof that he was on when the board hit the top of his toe, do you do those types of roofs?

A. No, sir.

Q. Why not?

A. They are too dangerous.

Q. What's the steepest pitch roof you do?

³ *Ibid.* at 36-38.

A. Usually about a seven.⁴

The ALJ analyzed the evidence in the following fashion:

The Claimant is alleging an injury to his left toe in July of 2009. On August 28, 2009, in a medical clinic in Dallas, Texas, the Claimant reported that: A week ago he noticed a blister on his left big toe. There is no mention of a job accident.

On December 28, 2009, the records of Dr. Michelle Klauman state that the Claimant had a crush injury "several weeks ago".

The Claimant originally filed this Claim alleging a work accident in October of 2009.

After the Dallas medical records were brought to the Claimant's attention, the date of accident was amended to July 2009.

The Claimant's request for benefits is denied.⁵

Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's owner testify in person. In denying the claim, the ALJ apparently believed respondent's owner's testimony over the claimant's testimony. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Based upon review of the entire evidentiary record this Board Member agrees with the ALJ's analysis and affirms the ALJ's Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated January 6, 2011, is affirmed.

⁴ *Ibid.* at 39-40.

⁵ ALJ Order (Jan. 6, 2011) at 1.

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2010 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this 31st day of March, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent
Kendall R. Cunningham, Attorney for WCF
John D. Clark, Administrative Law Judge